DIRECTOR-GENERAL OF INLAND REVENUE *a*

v.

MAMOR SDN. BHD.

FEDERAL COURT, JOHOR BAHRU
WAN SULEIMAN ACTING CJ (MALAYA)
SYED OTHMAN FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 237 OF 1979]
14 MAY 1982 *b*

REVENUE LAW: *Income tax - Assessment of - Timber profit tax and development tax - Appeal against decision of Judicial Commissioner - Whether appellate Court can reverse finding of fact by Special Commissioners - Whether income from extraction and sale of timber chargeable under s. 4(a), Income Tax Act 1967 - Whether activity of extraction and sale a separate and distinct activity - Whether a single venture can constitute a business under s. 2 of the Act.* *c*

The respondent to the appeal had earlier appealed to the Special Commissioners of Income Tax ("Special Commissioners") against assessment of income tax, timber profit tax and development tax. The Special Commissioners had held (1) that the sums received from the extraction and sale of timber from the land were income chargeable to income tax, development tax and profit tax and (2) that there were two separate and distinct activities, namely the extraction and sale of timber from the said land which constituted the carrying on of a business of timber operators under s. 4(a) of Income Tax Act 1967, and the development of the land into an oil palm estate. *d* *e*

The Special Commissioners found the following facts. The respondent company was incorporated in 1968 to carry on, among other things, the business of planters and cultivators of and dealers in all kinds and descriptions of produce, and to carry on business as timber merchants, sawmill proprietors etc., any of the objects to be pursued as an independent object either alone or in conjunction with all or any other objects. *f*

In 1968 the Johore State Government contemplated a scheme to alienate state land to the private sector for development. The respondent was one of the successful applicants. He was allotted a parcel of virgin jungle land described as block 6 comprising an area of approximately 7,000 acres for development into oil palm plantation. One of the terms was that the respondent would be given the right to extract timber from land on entering into an agreement with the State Government. In 1969, the respondent entered into such an agreement. In 1970, it entered into an agreement with a company to extract timber from the land. In the same year it was given logging licence and soon commenced logging operation. *g*

The special Commissioners also found that during the relevant basis periods, only two blocks of 1,000 acres each were exploited. On the same facts the Judicial Commissioner, on the other hand, drew what he considered were reasonable inferences therefrom, and came to the conclusion that the extraction and sale of timber and the development of land were really one activity for the purpose of income tax that the sums received from the extraction and sale were received in the course of developing the land as an oil palm plantation and therefore not subject to income tax, development tax or timber profit tax. The Director-General of Inland Revenue appealed. *h*

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Held:

[1] The Judicial Commissioner erred in law in reversing the finding of fact and the decision of the Special Commissioners.

(i) Where there is ample evidence for the Special Commissioners to consider the Court must treat the decision of the Special Commissioners as final. It matters not that on the same evidence the Court might not, if it were in its' province to decide, have come to the same conclusion. The findings of primary facts by the Special Commissioners are unassailable. [*Chu Lip Kong v. Director-General of Inland Revenue* (Privy Council Appeal No. 21 of 1979) A Court of appeal is not concerned with the evidence given in a case stated by the Special Commissioners but with the facts therein stated and it is points of law upon those facts the Court has to decide. [*UHG. v. Director-General of Inland Revenue* [1974] 1 MLJ 33; *Edwards (Inspector of Taxes) v. Bairstow and Harrison* [1956] AC 14].

(ii) The Special Commissioners were correct in considering both the documents i.e. the memorandum and the agreement of 1969 between the respondent and the State Government and all the objects of the company. A company whose business is or includes trading *prima facie* begins to trade as soon as it embarks upon the first transaction of a trading nature. A transaction could constitute trading even if it was isolated. [*International Investment Ltd. v. Comptroller General of Inland Revenue* [1979] 1 MLJ 4]. A distinction exists between isolated transactions by individuals and isolated transactions by companies. [*American Leaf Blending Co. Sdn. Bhd. v. Director - General of Inland Revenue* [1979] 1 MLJ 1].

[2] The Judicial Commissioner had erred in holding that the income from the extraction of timber was capital income. The 'income' was of a type chargeable with income tax and the respondent was properly held to be chargeable under s. 4(a) of the Act by the Special Commissioners who had found that the respondent was carrying on two distinct activities. A single venture can be a 'trade' such as to constitute such venture a business as defined in s. 2 of the Act, the income from which is taxable under s. 4 (a) thereof. The question whether a particular venture is in the nature of a trade depends on its character and circumstances. [*Rutledge, v. The Commissioners of Inland Revenue,* 14 TC 490]

[Appeal allowed with costs.]

Cases referred to:

UHG. v. Director-General of Inland Revenue [1974] 1 MLJ 33
Edwards (Inspector of Taxes) v. Bairstow and Harrison [1956] AC 14
Chu Lip Kong v. Director-General of Inland Revenue [1979] PC APP 21
E v. Comptroller of Inland Revenue [1970] 2 MLJ 117
International Investment Ltd. v. Comptroller General of Inland Revenue [1979] 1 MLJ 4
American Leaf Blending Co. Sdn. Bhd. v. Director-General of Inland Revenue [1979] 1 MLJ 1
Rutledge v. The Commissioners of Inland Revenue 14 TC 490

Legislation referred to:

Income Tax Act 1967, ss. 2, 4, (a)
Income Tax Ordinance 1947, s. 10(1)(a)

For the appellant - Mokhtar Sidin, SFC.,(Zulkifli with him)
For the respondent - Michael Wong (C. Dass with him)

JUDGMENT

Wan Suleiman Acting CJ (Malaya):

The Mamor Sendirian Berhad, the respondent in this appeal had earlier appealed to the Special Commissioners of Income Tax (hereinafter referred to as the Special Commissioners) against assessment of income tax, timber profit tax and development tax.

The question submitted for consideration by the Commissioners was whether the sums received by the respondent from the extraction and sale of timber from the said land for the relevant basis periods were sums received in the course of development of the said land into an oil palm plantation and were capital receipts and not income from a separate business of timber operators carried on by the respondent as mentioned in the agreed statement of facts, or were on the other hand, income chargeable to income tax, development tax and timber profit tax.

The Special Commissioners found firstly that the sums received from the extraction and sale of timber from the land were income chargeable to income tax, development tax and profit tax, and secondly that there were two separate and distinct activities. (See also pp. 8 to 18 of case stated, which contains para. 7 wherein the Special Commissioners set out the facts proved or admitted, as found by them.)

The Special Commissioners therefore found that there were two separate and distinct activities namely, the extraction and sale of timber from the said land and the development of the said land into an oil palm estate. Such extraction and sale of the said timber, they found, constituted the carrying on of a business of timber operators under s. 4(a) of Income Tax Act 1967.

The Special Commissioners found the following facts. The respondent company was incorporated in 1968. Its objects among other things were to carry on the business of planters and cultivators of and dealers in all kinds and descriptions of produce (clause. 1 of memorandum of Association) and to carry on business as timber merchants, sawmill proprietors, etc. (clause. 19 of memorandum of association). Either of these two objects or any of the objects specified in the memorandum of Association may be pursued by the respondent as an independent object either alone or in conjunction with all or any one or more of the other objects.

In 1968 the Johore State Government was contemplating a scheme to alienate state land to the private sector for development. In August 1968 the news was published in the newspapers that the Government would alienate 42,000 acres of virgin land in the district of Kluang and Sungai Pengali on a 99 years lease for the scheme. Successful applicants would be given 7,000 acres for the development of oil palm. The applicants would be required to surrender 1,500 acres from the 7,000 acres when they are fully planted with oil palm to the Johore State Development Corporation. The State Development Corporation would realienate the 1,500 acres to small-holders.

The respondent was one of the successful applicants. He was informed of the approval by the state government by way of notice dated 30 November 1968. The respondent was allotted a parcel of virgin jungle land described as block 6 comprising an area of approximately 7,000 acres in the Mukim of Nyior in the district of Kluang, for development into oil palm plantation subject to payment of various charges and to certain terms and conditions as stipulated in the notice. As one of the terms and conditions the respondent would be given the right to extract timber from the land; the respondent was required to enter into an agreement with the State Government with regards to the extraction of timber from the land.

Following this the respondent entered into an agreement with the State Government on 1 June 1969. On 3rd January 1970 the respondent entered into an agreement with Syarikat Kilang Papan Low Nam Hui Sdn. Bhd. to extract the timber from the land. On 22 September 1969 an area of approximately 50,000 acres which included block 6 was de-gazetted as a forest reserve.

The respondent was given the logging licence in April 1970 and commenced logging operation on 20 July 1970.

The Special Commissioners also found that during the relevant basis periods in respect of which assessment of income tax, timber profit tax and development tax were made only two blocks of 1,000 acres each were exploited. Each bloc was divided into sub-blocks of 250 acres each.

The learned Judicial Commissioner, on the facts as found by the Special Commissioners, drew what he considered were reasonable inferences therefrom, and came to the conclusion that the extraction and sale of timber and the development of the land into an oil palm plantation were really one activity for the purpose of income tax. In consequence, he held that the sums received by the respondent from the extraction and sale of timber were received in the course of developing the land as an oil palm plantation, and therefore not subject to income tax, development tax or timber profit tax. The Director General of Inland Revenue now appeals.

The grounds of appeal may best be summed up thus:

That the learned Judicial Commissioner had erred in law in (i) reversing the finding of fact and the decision of the Special Commissioners i.e. that respondent was carrying out two different activities, and (ii) in holding that the income from the extraction of timber was capital income i.e. sums received in the development of the land into an oil palm plantation and therefore not chargeable with income tax, etc.

Our attention was drawn to various passages in the decision of this Court in *UHG. v. Director-General of Inland Revenue* [1974] 1 MLJ 33, wherein the well-known English authority of *Edwards (Inspector of Taxes) v. Bairstow and Harrison* [1956] AC 14, was cited with approval. At p. 33 of the former authority appears this passage:

> It is well established that where the appeal is by way of a case stated a statutory duty is laid upon the Special Commissioners to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. The Court of appeal is not concerned with the evidence given in the case stated but with the facts therein stated and it is points of law upon those facts the Court has to decide. The question for the Court of appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach.

And at page 37 -

> The particular issue of fact is whether the service agreements were a sham. That appears to me to be a question of fact which is proper to be decided by the Special Commissioners upon the evidence brought before them. The quantum of evidence necessary to prove this fact would no doubt fall on the respondent who is free to adduce whatever evidence to consider, the decision of the Special Commissioners is final, even though the Court might not, on the materials, have come to the same conclusion.

In other words, counsel submits that where two inferences are available to the Special Commissioners they could choose either and not be upset by the Court.

The unassailability of finding of primary facts by the Special Commissioners has again been emphasised by the Privy Council in the recent decision in *Chu Lip Kong v. Director-General of Inland Revenue* (Privy Council Appeal No. 21 of 1979) wherein the following passage occurs:

> Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither over-ruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the commissioners that they should set out in the Case Stated as having been 'admitted or proved'.

In his judgment the learned Judicial Commissioner was also critical of what he considered was the undue influence the objects clause in respondent's memorandum of association which empowered it to carry out *inter alia* the business of timber merchant (p. 74 para. 19). The learned Judicial Commissioner had relied on the authority of *E v. Comptroller of Inland Revenue* [1970] 2 MLJ 117, citing a portion which reads thus:

> I need hardly add that in this case the clause in question in relation to the objects of the company... As there were other objects of the company, singling out one of them for the inference that the appellant intended to carry on business was to ignore the other object together....

It was contended by appellant that the Special Commissioners were correct in considering both the documents, the memorandum and the agreement respondent entered into with the state government on 1 June 1969 (exhibit A1 Folio 31).

A number of authorities were cited to support this argument but we think we need only refer to the Privy Council decision in *International Investment Ltd. v. Comptroller General of Inland Revenue* [1979] 1 MLJ 4.

There, the appellant company, one of whose objects was to traffic and otherwise deal in or turn into account immovable property, had acquired certain lands and had begun building operations on the lands. Subsequently it agreed to sell the lands and the uncompleted building on it to another company in exchange for shares in the company. These shares were subsequently transferred by the company. The company was assessed to tax on the profits obtained by it. On appeal the Special Commissioners upheld the assessment and a further appeal to the High Court by way of case stated was dismissed [[1973] 2 MLJ 10]. An appeal from the judgment of the High Court was dismissed by the Federal Court and the appellant company appealed. It was argued on behalf of the appellant that the profit was not and could not be taxable as income under s. 10(1)(a) of the Income Tax Ordinance 1947, because the transaction from which it was received was an isolated transaction which did not constitute the carrying on of a trade or business. It might have been an adventure in the nature of trade but it could not have been trading because trading necessarily involved some repetition or continuity of operation and that element was lacking in the case. It was also argued that in any event the facts showed that when the appellant company acquired and developed the property, it was not trafficking or dealing in land but was investing in land, and any profit on the realisation of its investment was not of an income nature and was not assessable to income tax.

It was held that a company whose business is or includes trading *prima facie* begins to trade as soon as it embarks upon the first transaction of a trading nature. The transaction in this case could therefore constitute trading even if it was isolated.

Their Lordships of the Privy Council agree with the distinction drawn between isolated transactions by individuals and isolated transactions by companies, which the Board reiterated in *American Leaf Blending Co. Sdn. Bhd. v. Director-General of Inland Revenue* [1979] 1 MLJ 1.

The effect of these authorities is that where there is ample evidence, as we find there is for the Special Commissioners, to consider, we must treat the decision of the Special Commissioners as final. It matters not that on the same evidence, we might not, if it were in our province to decide, have come to the same decision.

It was also submitted that the learned Judicial Commissioner had erred in law in holding that the Special Commissioners had failed to show clearly that the proceeds were "income" of a type chargeable with income tax and fitted into the relevant provisions.

Section 4 of the Income Tax Act 1967 reads:

> Subject to this Act the income upon which tax is chargeable under this Act is income in respect of :
>
> (a) gains or profits from a business, for whichever period of time carried on;

The Special Commissioners, in the case stated, had found that the respondent was carrying on two separate and distinct activities viz., the extraction and sale of timber from the land and the development of the land into an oil palm estate.

It was submitted on behalf of appellant that a single venture can be a "trade" such as to constitute such venture a business as defined in s. 2 of the Act, the income from which is taxable under s. 4(a) thereof.

It was urged upon us that the proper test applicable was that applied in *Rutledge v. The Commissioners of Inland Revenue* (14 TC 490).

There, the appellant, Rutledge, was a moneylender who was also in 1920 interested in a cinema company. He had since that time been interested in various businesses. Being in Berlin in 1920 on business connected with the cinema company, he was offered an opportunity of purchasing very cheaply a large quantity of paper. He effected the purchase and, within a short time after his return to this country, sold the whole consignment to one person at a considerable profit.

Held, that the profits in question were liable to assessment to Income Tax, Schedule D, and to excess profits duty as being profits of an adventure in the nature of trade.

In delivering the judgment of the Court, the Lord President said,

> The question remains whether the adventure was one 'in the nature of trade'. The appellant's contention is that it could not be such, because it is essential to the idea of trade that there should be a continuous series of trading operations; and an observation made in the course of my opinion in *Inland Revenue v. Livingston* [1927] SC 251, at p. 255, was founded on, according to which (1) 'a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue." But the question here is not whether the appellant's isolated speculation in toilet paper was a trade, but whether it was an 'adventure in the nature of trade", and in

the opinion referred to I said that, in my opinion, "the profits of an isolated venture ... may be taxable under Schedule D provided the venture is in the nature of trade.' I see no reason to alter that opinion. It is no doubt true that the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances, but if - as in the present case - the purchase is made for no purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was "in the nature of trade," though it may be wholly insufficient to constitute by itself a trade.

We agree that the test aforementioned is indeed the proper one to apply in this appeal, so that the respondent was properly held to be chargeable under s. 4(a) of the Income Tax Act 1967 by the Special Commissioners.

We would therefore allow this appeal. The finding of the learned Judicial Commissioners is set aside and the decision of the Special Commissioners restored.

Costs to the appellant. Deposits to be refunded to appellant to account of taxed costs.

Also found at [1982] CLJ 532